Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

VINOD PATEL,

Petitioner,

v.

CITY OF GILROY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a Municipal Transient Occupancy Tax Ordinance That Prescribes Criminal Penalties for Violation of Any of its Provisions but Lacks a Scienter Requirement Is Facially Void under the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceeding are Petitioner Vinod Patel ("Petitioner") and Respondent City of Gilroy ("Respondent" or "City").

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OPINIONS BELOW

The Judgment by the Superior Court of the State of California for the County of Santa Clara was entered on June 20, 2000 (the "Superior Court Order") (App. C). The published Opinion by the Court of Appeal of the State of California for the Sixth Appellate District affirming the Judgment by the Superior Court was entered on March 8, 2002 (the "Opinion") (App. B) . The Opinion is reported at 97 Cal. App.4th 483 (2002). The Order of the California Supreme Court sitting en banc denying the Petition for Review was entered on June 12, 2002 (the "California Supreme Court Order") (App. A) .

JURISDICTION

The California Supreme Court Order was entered on June 12, 2002. This Court extended the time to file this Petition for Writ of Certiorari to and including October 9, 2002 (Application No. 02A189) . The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) .

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment of the United States Constitution is set forth below:

The Fourteenth Amendment to the United States Constitution, Section 1 states in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or

property, without due process of law; nor deny to ant person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. FACTS

Petitioner Vinod Patel, owner of the Pacheco Pass Motel in the City of Gilroy, petitions for review the entry of the judgment upholding tax assessments imposed on the motel by the the Respondent City of Gilroy.

This petition presents a facial challenge to a criminal transient occupancy tax ordinance. Petitioner contends that the City of Gilroy Transient 0ccupanct Tax ordinance [1] that created and defined the tax is unconstitutionally vague under the Fourteenth Amendment of the United States Constitution.

The ordinance requires the proprietor of each "hotel"[2]

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[1] City of Gilroy Municipal Code § 25A.

[2] The term "Hotel" is defined as:

"Hotel" means any structure, or any portion of any structure which is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes, and includes any hotel, inn, tourist home or house, motel, studio hotel, bachelor hotel, lodging house, rooming house, apartment house, dormitory, public or private club, mobile home or house trailer at a fixed location, or other similar structure or portion thereof." (Former City of Gilroy Municipal Code § 25A. I. Ordinance No. 928, § 1 (1971) .)

"Hotel" now includes a recreational vehicle park. (City of

in the City of Gilroy to collect, along with the rent, a 9 percent tax from each "transient" [3] for the privilege of "occupancy" [4]in the hotel.

The ordinance provides for "exemptions" [5] from the tax.

Gilroy Municipal Code § 25A.I. Ordinance No. 97-9, § I (October 20, 1997).)

[3] The term "Transient" is defined as:

".. any person who exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement, for a period of thirty (30) consecutive calendar days or less, counting portions of calendar days as full days. Any such person so occupying space in a hotel shall be deemed to be a transient until the period of thirty (30) days has expired, unless there is an agreement in writing between the operator and the occupant providing for a longer period of occupancy. In determining whether a person is a transient, uninterrupted periods of time extending both prior and subsequent to the effective date of the ordinance may be considered." (City of Gilroy Municipal Code § 25A.I.)

[4] The term "Occupancy" is defined as:

"the use or possession, or the right to the use or possession of any room or rooms or portions thereof, in any hotel for dwelling, lodging or sleeping purposes." (City of Gilroy Municipal Code § 25A.I.)

[5] The "Exemptions" section states:

"No tax shall be imposed upon:

(a) Any person as to whom, or any occupancy as to which, it is beyond the power of the city to impose the tax herein provided;

The ordinance also prescribes criminal penalties for violation of any of its provisions.[6] This provision does not contain a scienter requirement.

In June 1998, following an audit, the City notified petitioner that he owed $26,292.33 in delinquent taxes, interest and penalties under the ordinance.

After a hearing in August 1998, the administrative services director ("Director") found that petitioner owed the City $10,965.36, attributable to exemptions improperly claimed for the three-year audit period ending December 1, 1996, plus interest. The Director noted that the motel kept "very erratic" records, and that there were no written agreements for stays of more than 30 days, which would have allowed an exemption from the tax. However, the Director also noted that many of the hotel patrons had in fact stayed longer than 30 days, as reflected in the room rental cards. The Director further found that petitioner had collected some tax, which he had included in the room rate without itemizing it on

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(b) Any officer or employee of a foreign government who is exempt by reason of express provision of federal law or international treaty.

No exemption shall be granted except upon a claim thereof made at the time rent is collected and under penalty of perjury upon a form prescribed by the director of finance." (City of Gilroy Municipal Code § 25A.1.)

[6] The ordinance states regarding criminal penalties that:

"Violations; misdemeanor.
Any person violating any of the provisions of this chapter shall be guilty of an infraction."
(City of Gilroy Municipal Code § 25A.13.)

the rental cards. Consequently, the Director allowed an exemption from the tax for all of the patrons who appeared to have stayed more than 30 consecutive days.

The Director declined to impose penalties, finding no intent to under report taxes.

Petitioner filed a timely appeal to the Gilroy City Council, which conducted a hearing and upheld the Director's findings. In January 1999, petitioner filed a petition for a writ of mandate and complaint for declaratory and injunctive relief in the Santa Clara Superior Court. The petitioner alleged that the assessment violated his right to due process and equal protection, and that the ordinance was facially void for vagueness under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

In August 1999, the City filed its own complaint to recover the amounts found due by the Director and the city council, along with the interest that had continued to accrue. Pursuant to a stipulation by the parties, the court ordered that the outcome of the proceedings against the City would control the outcome of the City's collection lawsuit against the petitioner. As part of the stipulation the parties acknowledged that if the City prevailed, it would be entitled to recover the amount found due by the Director, plus accrued interest. On June 20, 2000, the superior court entered judgment in favor of the City, finding the ordinance to be "valid and constitutional." (App. C).

Petitioner filed a timely appeal to the California Court of Appeal for the Sixth Appellate District. On March 8, 2002, the court of appeal, in a published opinion held that the ordinance was not unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment of the United

States Constitution, since it gave fair notice of its collection and reporting requirements and provided reasonably adequate standards to guide enforcement. (App. B) .

The court of appeal held that while the definitions of "hotel" and "occupancy" contained the words "dwelling" and "lodging", implying either a temporary or permanent situation, and that the "exemptions" section was "hardly a model of clarity in exempting whoever is 'beyond the power of the city to impose the tax,'" (App. B, pp. 13a-13b), but that the tax clearly applied solely to those who occupied a hotel for a period of 30 consecutive calendar days or less who had not entered into written agreements for longer stays. Thus, as the court of appeal reasoned, it was clear what the ordinance as a whole prohibited, and the ordinance was valid in the vast majority of its intended applications.

Petitioner filed a timely Petition for Review of the court of appeal opinion to the California Supreme Court.

On June 12, 2002, the California Supreme Court sitting en banc denied the Petition for Review. (App. A) .

REASONS FOR GRANTING THE WRIT

A. The Ordinance Violates Due Process in That it Fails to Provide Fair and Adequate Notice of the Type of Conduct Prohibited and Encourages Arbitrary and Discriminatory Law Enforcement.

The Court has long recognized that the constitutionality of a vague statutory standard in a criminal statute is closely related to whether that standard incorporates a scienter requirement. *Colautti v. Franklin,* 439 U.S. 379,

395, 99 S.Ct. 675, 685, 58 L.Ed.2d 596 (1979) ; *United States v. United States Gypsum Co.*, 438 U.S. 422, 434-446, 98 S.Ct. 2864, 2873, 57 L.Ed.2d 854 (1978) ; *Papachristou v. Jacksonville,* 405 U.S. 156, 163, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972) ; *Boyce Motor Lines v. United States*, 342 U.S. 337, 342, 72 S.Ct. 329, 331, 96 L.Ed. 367 (1952) .

This is not an ordinance that "simply regulates business behavior and contains a scienter requirement, " *see Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) , this is a criminal tax ordinance that contains no scienter requirement.

The absence of a scienter requirement in the section directing criminal penalties for any violation of its provisions renders the ordinance little more than "a trap for those act in good faith." *United States v. Ragen,* 314 U.S. 513, 524, 62 S.Ct. 374, 379, 86 L.Ed. 383 (1942) ; *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972) (enunciating the standards of fair notice and fair enforcement for evaluating vagueness and stating that "[v]ague laws may trap the innocent by not providing fair warning").

The Court has stated that "the degree that the Constitution tolerates - as well as the importance of fair notice and fair encforcement - depends in part on the nature of the enactment." *Hoffman Estates,* 455 U.S. at 498, 102 S.Ct. at 1193.

By way of example, the Court in *Hoffman Estates* further explained that the Court has traditionally expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe, and that a scienter requirement may

mitigate a law's vagueness, especially with respect to the adequacy of notice. *Id.*, 455 U.S. at 498-499, 102 S.Ct. at 1193.

Because of the complexity of the nature of this municipal tax law, a person should not be exposed to criminal penalties for a bona fide misunderstanding as to liability for the tax, as to his duty to make a return, or as to the adequacy of the records of the records he maintains, merely by his failure to measure up to the prescribed standard of conduct.

A legislature's failure to establish a scienter requirement not only fails to provide fair warning, but impermissibly delegates basic policy matters to law enforcement, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications as to who has criminally violated the ordinance's requirements.

The Court has repeatedly emphasized that where a legislature fails to establish minimal guidelines to govern law enforcement, a criminal statute may permit " 'a standardless sweep [that] allows policeman, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson,* 461 U.S. 352, 356, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (quoting *Smith v. Goguen,* 415 U.S. 566, 574, 94 S.Ct. 1242, 1247-1248, 39 L.Ed.2d 605 (1974)).

For example, in the area of federal income taxation, because of the complexity of the nature of the tax laws, Congress has required "willfulness" as an element of certain federal criminal tax offenses, and the Court has traditionally construed this term as connoting "a voluntary, intentional violation of a known legal duty." *United States v. Bishop,* 412 U.S. 346, 360, 93 S.Ct. 2008, 2017, 36 L.Ed.2d 941 (1973).

While it is certainly true that " [i]n evaluating a facial challenge to a state law, a federal court must, of course consider any limiting construction that a state court or enforcement agency has proffered," *Hoffman Estates,* 455 U.S. at 494, n. 5, 102 S.Ct. at 1191, n. 5, the limiting construction by the court of appeal opinion does not cure the foundational defect of a lack of a scienter or mens tea requirement.

The perils of strict criminal liability are particularly acute here because the terms "dwelling" or "lodging" by definition imply permanent residency, [7] and are used in the central definitions of "transient", "hotel" and "occupancy".

Even more confusing is the fact that the definitional structure is patently circular. "Hotel" is not defined simply as a structure which furnishes occupancy intended for dwelling or lodging; it is defined as a structure which furnishes occupancy for dwelling or lodging to a "transient" But "transient" is not simply defined as a person who obtains occupancy for 30-days or less; it is defined as a person who obtains occupancy in a "hotel" The definitions of "hotel" and "transient" are rendered hopelessly confusing since the common term "occupancy" is defined as a person who obtains possession for "dwelling" or "lodging" purposes.

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[7] Two previous published state appellate opinions invalidated other municipal transient occupancy tax ordinances on federal due process grounds and emphasized that the definition of a "transient" occupancy tax by use of the terms "dwelling" or "lodging" is inherently ambiguous and confusing. *See Britt v. City of Pomona,* 223 Cal. App.3d 265 (1990) ; *City of San Bernardino Hotel/Motel Association v. City of San Bernardino,* 59 Cal. App. 4th 237 (1997).

The court of appeal's attempt to limit the construction of the ordinance does solve the inherent circularity of the definitional structure.

The court of appeal also held that "the hotel guest is invariably deemed to be a transient until the first 30 days have passed, even if he or she appears to be 'dwelling' in the hotel for that period." (App. B, pg. 12a) .

This statement is nonsensical. Even granting the court of appeal's limiting construction, the term to "appear to be dwelling" in a genuine transient occupancy situation is a contradictory statement.[8]

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[8] By way of illustration, a previous California appellate court explained in invalidating another transient occupancy tax on federal due process grounds that the use of the term "dwelling" in the definition of a transient occupancy tax is inherently ambiguous:

> "The 1987 ordinance sends mixed signals. Section 9126 of that ordinance states that 'transients' have to pay the tax; but in its definitions of 'hotel' and occupancy', the ordinance includes the word 'dwelling'.The plain definition of to 'dwell' means 'to be or continue in some state or condition.' A 'dwelling" is 'a building or construction used for residence.' To 'reside' is 'to settle oneself or a thing in a place' be stationed: remain, stay.' A 'resident' is 'one who dwells in a place for a period of some duration.' (Webster's New Internat. Dict. (3rd ed. 1981) pp. 706, 1931). Thus, the text of the ordinance appears to address both transients and persons in residence." *Britt*, 223 Cal. App.3d at 278-279 (1990) .

Moreover, the court of appeal's attempt to further limit the reach of the ordinance by holding that a written agreement providing for a longer occupancy will remove the rental arrangement from the transient occupancy tax remains ambiguous as long as there exist no minimal guidelines in defining the term "written agreement".

The "exemptions" section of the ordinance further exacerbates the problem of vagueness and circularity since it is unclear who is exempt from the tax, as this section does not set forth adequate guidelines or definitions as to which class of "persons" or "occupancy" it is "beyond the City to impose the tax."

The court of appeal recognized that the "exemption" section was "hardly a model of clarity in exempting whoever is 'beyond the power of the city to impose the tax,'" (App. B, pg. 13a) and further stated that the fact that a term is somewhat imprecise does not itself offend due process. (App. B, pg. 13a). However, it did not offer a limiting construction of this portion of the ordinance other than stating by way of example that:

> "Here the Director expressed no confusion in determining that appellant had not entered any written agreements with patrons who had stayed in the motel for a period shorter than 31 days; nor did he appear to have any difficulty construing the ordinance to require the collection of tax from those guests." (App. B, pg. 14a) .

Not only does this statement essentially misapprehend the void-for-vagueness doctrine which focuses on actual notice to the petitioner, not the Director, *see Kolender* , 461 U.S. at

357-358, 103 S.Ct. at 1858, it also illustrates that inherent ambiguity that remains in the ordinance even given its previous limiting construction since there is simply no standard to be found in this section as to how it is be applied, let alone applied in the manner construed by the court of appeal.

This grant of unchanneled, standardless discretion "does not even begin to meet th[e] constitutional requirement [of due process] ." *Giaccio v. Pennsylvania*, 382 U.S. 399, 403, 86 S.Ct. 518, 521, 15 L.Ed.2d 447 (1966).

In *Giaccio*, Justice Black, eloquently stated for the Court that:

> "Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce." *Id.*, 382 U.S. at 403, 86 S.Ct. at 521.

This ordinance as written does not even begin to meet the constitutional requirement of due process. It is impossible to apply the ordinance's requirements with reasonable certainty in advance. Moreover, the circular definitions of "transient", "hotel" and "occupancy" deprive these terms of any meaningful content. By imposing criminal penalties for failure to comply with its provisions without a scienter requirement it cannot meet the exacting standards of due process.

The ordinance viewed as a whole, fails to provide adequate notice and encourages arbitrary and discriminatory enforcement.

Although due process does not require "impossible standards" of clarity, *see United States v. Petrillo,* 332 U.S. 1, 7-8, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947), this is not a case where further precision in the ordinance's language is either impossible or impractical.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari be granted and that the City of Gilroy's Transient Occupancy Tax Ordinance be declared and determined to be unconstitutional and void.

Respectfully submitted,

LAW OFFICES OF FRANK A. WEISER

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA
En Banc

[Filed June 12, 2002]

No. S106060

CITY OF GILROY	)
Plaintiff and Respondent,	)
v.	)
	)
LEAVESLEY OCEAN-INN INVESTORS et al.,	)
Defendants and Appellants.	)
	)

Court of Appeal, Sixth Appellate District
No. H021889

ORDER

Petition for review denied.

GEORGE
Chief Justice

APPENDIX B

COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

[Filed March 8, 2002]
[Reported at 97 Cal. App. 4th 483]
No. H021888

VINOD PATEL,
Plaintiff and Appellant,

v.

CITY OF GILROY,
Defendant and Respondent.

Superior Court of Santa Clara County
Super. Ct. No. CV779614
Leslie Nichols, Judge

JUDGES:
Elia, J. WE CONCUR Premo, Acting P.J. Mihara, J.

OPINION

Vinod Patel, owner of the Pacheco Pass Motel in Gilroy, appeals from a judgment upholding the tax assessments imposed on the motel by the City of Gilroy (City). Appellant contends that the ordinance that created and

defined the tax is unconstitutionally vague. We disagree and affirm the judgment.

Background

In June 1998, following an audit, the City notified appellant that he owed $26,292.33 in delinquent taxes, interest and penalties, under the city's Transient Occupancy Tax ordinance, Gilroy City Code section 25A.1, et. seq.[1] The ordinance requires the proprietor of each "hotel" to collect, along with the rent, a 9 percent tax from each "transient" for the privilege of "occupancy" in the hotel.[2] (§ 25A.2.)

After a hearing in August 1998, the Administrative Services Director (Director) found that appellant owed the

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[1] All further unspecified section references are to the Gilroy City Code.

[2] Section 25A.2 specifically states: "For the privilege of occupancy in any hotel, each transient is subject to and shall pay a tax in the amount of nine per cent (9%) of the rent charged by the operator. Said tax constitutes a debt owed by the transient to the city which is extinguished only by payment to the operator or to the city. The transient shall pay the tax to the operator of the hotel at the time the rent is paid. If the rent is paid in installments, a proportionate share of the tax shall be paid with each installment. The unpaid tax shall be due upon the transient's ceasing to occupy space in the hotel. If for any reason the tax due is not paid to the operator of the hotel, the director of finance may require such tax [to] be paid directly to the director of finance."

City $10,965.36, attributable to exemptions improperly claimed for the three-year audit period ending December 1, 1996, plus interest. The Director noted that the motel kept "very erratic" records, and that there were no written agreements for stays of more than 30 days, which would have allowed an exemption from the tax. However, the Director also noted that many of the hotel patrons had in fact stayed longer than 30 days, as reflected in the room rental cards. The Director further found that appellant had collected some tax, which he had included in the room rate without itemizing it on the rental cards. Consequently, the Director allowed an exemption from the tax for all of the patrons who appeared to have stayed more than 30 consecutive days. The Director declined to impose penalties, finding no intent to underreport taxes.

Appellant filed a timely appeal to the Gilroy City Council, which conducted a hearing and upheld the Director's findings. In January 1999, appellant, together with the owners of the Leavesley Inn,[3] filed a petition for a writ of mandate and complaint for declaratory injunctive relief. The petitioners alleged that the assessment violated their rights to due process and equal protection, and that the Transient Occupancy Tax ordinance was facially void for vagueness.

In August 1999 the City filed its own complaint to recover the amounts found due by the Director and the City

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[3] This appeal is being considered with *City of Gilroy v. Vinod Patel* (dba Oaks Motel), H021900, and *City of Gilroy v. Leavesley Ocean-Inn Investors*, H021889.

Council, along with the interest that had continued to accrue.[4] Pursuant to a stipulation by the parties, the court ordered that the outcome of the proceedings against the City would control the outcome of the City's collection lawsuit against appellant. As part of the stipulation the parties acknowledged that if the City prevailed, it would be entitled to recover the amount found due by the Director, plus accrued interest. On June 20, 2000, the court entered judgment in favor of the City, finding the Transient Occupancy Tax ordinance to be "valid and constitutional."

Discussion

An enactment may be declared unconstitutionally vague under the due process clauses of the United States Constitution and the California Constitution (U.S. Const., Amends V, XIV; Cal. Const., art. I, § 7) "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits [or] if it authorizes or even encourages arbitrary and discriminatory enforcement." (*Hill v. Colorado* (2000) 530 U.S. 703, 732, 147 L. Ed. 2d 597, 120 S. Ct. 2480; *Chicago v. Morales* (1999) 527 U.S. 41, 56, 144 L. Ed. 2d 67, 119 S. Ct. 1849; *People v. Castenada* (2000) 23 Cal.4th 743, 751.) A tax law in particular " 'must prescribe a standard sufficiently definite to be understandable to the average person who desires to comply with it. [Citation.]' " (*State Bd. of Equalization v. Wirick* (2001) 93 Cal.App.4th 411, 420.) We therefore must

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[4] The complaint is not in the clerk's transcript on appeal, but is referred to by the court in its subsequent order.

consider whether chapter 25A of the Gilroy City Code (the Transient Occupancy Tax ordinance) gives fair notice of the tax collection and reporting requirements and provides reasonably adequate standards to guide enforcement. (*Id.* at p. 419, quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 702, 209 Cal. Rptr. 682, 693 P.2d 261; *City of San Bernardino Hotel/Motel Assn. v. City of San Bernardino* (1997) 59 Cal.App.4th 237, 245.)

The primary focus of the parties' dispute is the definition of the terms used in section 25A.1 -- specifically, "hotel," "occupancy," and "transient." From 1994 to 1996, the period for which appellant was audited, "hotel" was defined as "any structure, or any portion of any structure, which is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes, and includes any hotel, inn, tourist home or house, motel, studio hotel, bachelor hotel, lodging house, rooming house, apartment house, dormitory, public or private club, mobile home or house trailer at a fixed location, or other similar structure or portion thereof." (Former § 25A.1; Ord. No. 928, 1971, § 1.)[5] The term "occupancy" refers to "the use or possession, or the right to the use or possession of any room or rooms or portions thereof, in any hotel for dwelling, lodging or sleeping purposes." (§ 25A.1.) And a "transient" is "any person who exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement for a period of thirty (30)

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[5] "Hotel" now includes a recreational vehicle park. (§ 25A.1, Ord. No. 97-9, § I, Oct. 20, 1997.)

consecutive calendar days or less, counting portions of calendar days as full days. Any such person so occupying space in a hotel shall be deemed to be a transient until the period of thirty (30) days has expired unless there is an agreement in writing between the operator and the occupant providing for a longer period of occupancy. In determining whether a person is a transient, uninterrupted periods of time extending both prior and subsequent to the effective date of this chapter may be considered." (§ 25A.1.)

Appellant contends that these terms are "hopelessly confusing" because they are defined in a circular way and fail to distinguish temporary living arrangements from permanent ones. The definitions of "hotel" and "occupancy," for example, are flawed because they contain the words "dwelling" and "lodging," which imply *either* a temporary or a permanent situation. The 30-day restriction in the definition of "transient" is inadequate to clarify the reach of the tax, appellant adds, because it suggests that a tenant of an apartment on a month-to-month arrangement must pay the tax for the first 30 days, a situation not intended by the lawmakers. "It is only on day 31, when the renter pays the second month's rent, that the owner may safely assume no tax is due. But the Ordinance chose to use the words 'hotel' and 'transient', which apparently was intended to exclude this hypothetical."

Appellant's argument is self-defeating, as it expressly invokes a "hypothetical" scenario appellant himself does not face. Whether a month-to-month apartment rental would create confusion in the lessor and lessee is not the problem presented here. Rather, here the only issue was whether

appellant failed to collect tax for those guests who stayed in his motel for 30 or fewer days without a written agreement for a longer stay. Appellant "cannot prevail by simply suggesting hypothetical situations in which constitutional problems *may* arise." (*People v. Sipe* (1995) 36 Cal.App.4th 468, 481, italics added.) "Speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.' "(*Hill v. Colorado, supra*, 530 U.S. at p. 733; *see also Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1109, 892 P.2d 1145 [unless law sweeps in substantial amount of constitutionally protected conduct, facially vague law must be invalid in all respects and applications]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201, 246 Cal. Rptr. 629, 753 P.2d 585 [in facial vagueness challenge party must demonstrate vagueness in "all of its applications," not just some instances of uncertainty or ambiguity]; cf. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 347-348, 940 P.2d 797.)

Appellant maintains, however, that we must exercise stricter scrutiny of the ordinance because it prescribes criminal penalties for violations.[6] (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8, 75 L. Ed. 2d 903, 103 S.

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[6] In addition to prescribing monetary penalties for noncompliance, the ordinance originally declared any violation of the ordinance a misdemeanor punishable by a $500 fine or imprisonment, or both. The current version of the ordinance declares such a violation to be an infraction.

Ct. 1855 [where a statute imposes criminal penalties, the standard of certainty is higher].) Penal enactments are given greater scrutiny when their enforcement threatens the exercise of constitutional rights, such as freedom of expression or freedom of movement. (*Chicago v. Morales, supra*, 527 U.S. at p. 55; Tobe v. City of Santa Ana, supra, 9 Cal.4th at p. 1095.) But where no such constitutional rights are at stake, it is the facts of the case and not hypothetical situations that determine the viability of a vagueness challenge. (*Chapman v. United States* (1991) 500 U.S. 453, 467, 114 L. Ed. 2d 524, 111 S. Ct. 1919; *People v. Sipe, supra*, 36 Cal.App.4th at p. 481.) Thus, if the conduct with which appellant is charged falls clearly within the bounds of the ordinance, appellant may not be heard to complain. (*Tobe v. City of Santa Ana, supra*, 9 Cal.4th at p. 1095.)

Even considering appellant's challenge as properly presented, we do not find the ordinance unconstitutionally vague. Appellant acknowledges that the Transient Occupancy Tax ordinance is presumed to be valid and must be upheld unless its unconstitutionality "'clearly, positively and unmistakably appears.'" (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404, 149 Cal. Rptr. 375, 584 P.2d 512; *Tobe v. City of Santa Ana, supra*, 9 Cal.4th at p. 1102; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780, 884 P.2d 645.) Furthermore, even when criminal penalties apply, a statute or ordinance will be upheld against a vagueness challenge " ' "if any reasonable and practical construction can be given its language." ' " (*State Bd. of Equalization v. Wirick, supra*, 93 Cal.App.4th at p. 420; *People v. Townsend* (1998) 62 Cal.App.4th 1390, 1400-1401; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090,

1117, 929 P.2d 596.) We are bound to give the ordinance before us "a liberal, practical common-sense construction . . . in accordance with the natural and ordinary meaning of its words." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245, 149 Cal. Rptr. 239, 583 P.2d 1281.)

In this case, appellant argues, the ordinance "is so vague that a hotel/motel operator cannot determine how to avoid the tax and properly comply with its requirements and that the respondent cannot avoid arbitrary enforcement." Specifically, as noted above, the ordinance uses circular definitions of "hotel" and "transient" and fails to distinguish between a person living from day to day or week to week in a motel and a person living in an apartment on a month-to-month tenancy. In addition, the provision for an "agreement in writing" is not defined, thereby adding to the "definitional confusion between 'transient' and 'permanent' occupancy." The "Exemptions" provision, section 25A.3, "further exacerbates the problem of vagueness and circularity" because it "does not set forth adequate guidelines or definitions as to which class of 'persons' or 'occupancy' it is 'beyond the City [*sic*] to impose the tax.' "[7]

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[7] Section 25A.3, "Exemptions," precludes imposition of the tax on "any person as to whom, or any occupancy as to which, it is beyond the power of the city to impose the tax herein provided." (§ 25A.3(a).) Also exempted are officers and employees of foreign governments if they are made exempt by an "express provision of federal law or international treaty."

Appellant relies principally on *City of San Bernardino Hotel/Motel Assn. v. City of San Bernardino, supra*, 59 Cal.App.4th 237, where the Fourth District, Division Two, found a hotel tax ordinance deficient because it inadequately defined "hotel," "occupancy," and "transient." He also cites *Britt v. City of Pomona* (1990) 223 Cal. App. 3d 265, 272 Cal. Rptr. 724, where the Second District, Division Three, invalidated an ordinance on vagueness grounds based on the "circular" definitions of "hotel" and "transient" which failed to distinguish temporary occupants from long-term residents in identifying who was subject to the tax.

The ordinance before us does not present the same interpretative difficulties as those examined in *San Bernardino* and *Britt*. In *Britt*, the City of Pomona used the term "dwelling" in the definition of "hotel," thus making it appear that permanent residents also had to pay the tax. Significantly, however, the definitions of the terms "hotel," "occupancy," and "transient" did not confine the tax to those occupying a hotel for any specific period.[8] Thus, it was readily susceptible of an interpretation that a person "dwelling" in the hotel on a long-term basis was subject to the tax. (223 Cal. App. 3d at p. 279.) The use of the term "transient" added circularity, not clarity, because a transient was defined as one who occupied a "hotel," while a "hotel" was a structure designed for occupancy by transients. In *San Bernardino* the central

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[8] The contested ordinances were the result of amendments that had eliminated the city's previous limitation of the occupancy period. Before the 1987 and 1988 amendments the ordinance had defined "transient" as a person who occupied a lodging for a period of 30 days or less. (*Britt, supra*, 223 Cal. App. 3d at p. 270.)

problem was not just that the ordinance used the term "dwelling" in the definition of "occupancy." Rather, the ordinance was confusing because it described a transient as a person who occupied a hotel for a period of 90 days or less *and* one who occupied the hotel for more than 90 days without a written agreement for "permanent" occupancy. Both "agreement in writing" and "permanent occupancy" were vague, as it was not clear to the court what kind of writing could qualify as a written agreement and "permanent" meant "any definite period of time," except for the first 90 days in certain kinds of facilities. (59 Cal.App.4th at pp. 249-250.) The court also acknowledged the hotel/motel association's argument that the definitions of "hotel" and "transient" were "needlessly contradictory" because the former included occupancy for no more than 30 days,[9] while the latter included occupancy for 90 days or (in some circumstances) more. (59 Cal.App.4th at p. 249.)

The Gilroy ordinance does not suffer from these infirmities. It is true that the definitions of "hotel" and "occupancy" refer to "dwelling" as well as "lodging or sleeping" purposes, but the tax applies solely to those who occupy a hotel "for a period of thirty (30) consecutive calendar days or less." There is no confusing 90-day period as in *San Bernardino*; the hotel guest is invariably deemed to be a transient until the first 30 days have passed, even if he or

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[9] The association's complaint referred to a definition of "hotel" that appeared to encompass mobile homes and house trailers in mobile-home parks occupied for 30 or fewer days. (*San Bernardino, supra*, 59 Cal.App.4th at p. 246.)

she appears to be "dwelling" in the hotel for that period.[10] That the provision may require tax on a tenant's rent for the first 30 days does not make it impermissibly vague. Furthermore, a written agreement providing for a longer occupancy will remove the rental arrangement from the reach of the ordinance. This exemption provision is not as ambiguous as that of the *San Bernardino* ordinance, which inadequately defined "permanent" as well as "agreement in writing" in the context of the convoluted definition of "transient." (59 Cal.App.4th at p. 249.)

The "Exemptions" provision, section 25A.3, is hardly a model of clarity in exempting whoever is "beyond the power of the city to impose the tax." Nevertheless, "the fact that a term is somewhat imprecise does not itself offend due process. Rather, so long as the language sufficiently warns of the proscribed conduct when measured by common understanding and experience, the statute is not unconstitutionally vague." *(People v. Ellison* (1998) 68 Cal.App.4th 203, 207-208; *see also People v. Hazelton* (1996) 14 Cal.4th 101, 109, 926 P.2d 423 [mere fact that statute requires interpretation does not make it

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[10] Although appellant suggests the City could not have intended to require the tax for the first 30 days of a longer stay, the language of this section appears to state otherwise: any person occupying space in a hotel "shall be deemed to be a transient until the period of thirty (30) days has expired unless there is an agreement in writing between the operator and the occupant providing for a longer period of occupancy." Thus, the tax need not be collected for the first 30 days only if there is a written agreement providing for a stay of longer than 30 days.

unconstitutionally vague].) "Because we are 'condemned to the use of words, we can never expect mathematical certainty from our language.' " (*Hill v. Colorado, supra*, 530 U.S. at p. 733.) "Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear. So long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face." (*Evangelatos v. Superior Court*, supra, 44 Cal.3d at p. 1201.)

Here the Director expressed no confusion in determining that appellant had not entered into any written agreements with patrons who had stayed in the motel for a period shorter than 31 days; nor did he appear to have any difficulty construing the ordinance to require the collection of tax from those guests. We do not believe that the exemption provision alone makes it impossible for a hotel operator to comply with his or her duty to collect the transient occupancy tax or that it promotes arbitrary enforcement of the law.

In summary, appellant has not demonstrated the facial invalidity of the ordinance on constitutional vagueness grounds. Because " 'it is clear what the ordinance as a whole prohibits,' " and because the ordinance is "surely valid 'in the vast majority of its intended applications,' " his facial vagueness claim must be rejected. (*Hill v. Colorado, supra*, 530 U.S. at p. 733.) The superior court properly upheld the tax assessments against appellant.

Disposition

The judgment is affirmed.

Premo, Acting P.J., and Mihara, J., concurred.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

[Filed June 20, 2000]

No. CV 779614

VINOD PATEL dba OAKS MOTEL and PACHECO PASS MOTEL; JOSEPH A. FILICE, General Partner of LEAVESLEY OCEAN INN-INVESTORS, a Limited Partnership dba LEAVESLEY INN,	)
Petitioners/Plaintiffs,	)
v.	)
CITY OF GILROY,	)
Respondent/Defendant.	)

JUDGMENT

This cause came on regularly for trial on May 18, 2000, in Department 6 of the above-entitled Court, the Honorable Leslie C. Nichols presiding. Petitioners appeared by their attorney, Frank A. Weiser, and Respondent appeared by its attorney, Jolie Houston. Evidence, both oral and documentary, having been presented by both parties, the

cause having been argued and submitted for decision, and the Court having caused to be made and filed herein its Notice of Decision.

Pursuant to the Court Orders and consistent with the Stipulations entered into by Petitioners and Respondent City, the issues for the Writ of Mandate and Complaint for Declaratory Relief and Injunctive Relief were limited to the following issues:

(a) Whether the tax assessment was illegal because the City's Transient Occupancy Tax Ordinance is "void for vagueness" under the Fifth and Fourteenth Amendments of the United States Constitution. Petitioners base this challenge on *City of San Bernardino Hotel/Motel Association v. The City of San Bernardino* (1997) 59 Cal. App. 4th 237.

(b) Whether the tax assessment was illegal because of the City's Transient Occupancy Tax Ordinance both on its face and as applied to Petitioners violated the due process requirement that government must provide a fair and meaningful predeprivation and/or postdeprivation remedy

from any disputed taxation. This challenge will be based on *McKesson Corp. v. Florida Alcohol & Tobacco Division* (1990) 496 U.S. 18 and subsequent United States Supreme Court authority following *McKesson*.

(c) Whether the tax assessment was illegal because the City's Transient Occupancy Ordinance both on its face and applied to Petitioners, violated their rights under the Fourth Amendment of the United States Constitution by the fact that the ordinance provides the owner/operator of the motel must keep records for a specified time, and the City has the power to inspect records without a subpoena or an administrative warrant. This challenge is based on *Pinney v. Phillips* (1991) 230 Cal. App. 3d 1570 and United States Supreme Court relied upon by *Pinney* entitled *New York v. Burger* (1987) 482 U.S. 691

The court having answered each of the questions posed by the foregoing issues in the negative, it is now appropriate

that judgment be entered in favor of the City of Gilroy as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT PETITIONERS RECOVER NOTHING BY THIS SUIT AND THAT JUDGMENT BE ENTERED IN FAVOR OF RESPONDENT CITY OF GILROY AS FOLLOWS:

(1) That Petitioners' two causes of action against the City for Writ of Mandate be denied in their entirety and that the Writ of Mandate vacating the City's tax assessments against Petitioners not be issued and said tax assessments against Petitioners not be set aside;

(2) That Petitioners' cause of action against the City for Declaratory Relief and Injunctive Relief be denied in its entirety and that the Respondent City's Transient Occupancy Tax Ordinance is hereby declared to be a valid and constitutional ordinance;

(3) That Petitioners recover nothing by this suit;

(4) That Respondent City shall be entitled to recover costs of suit herein incurred.

Dated: June 16, 2000 /s/ _____
Judge of the Superior Court